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No. ___-___

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IN THE

Supreme Court of the United States

October Term, 1992

EUGENE R. SYKORA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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November 24, 1992

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QUESTION PRESENTED FOR REVIEW

Whether evidence of predisposition to commit a criminal act need be known to the government before a person is targeted by a sting operation.

TABLE OF CONTENTS

Page

Questions Presented for Review i

Table of Authorities iii

Opinions Below 1

Jurisdiction 1

Statute Involved in Case 2

Statement Of The Case 2

Argument for Allowance of Writ 3

Conclusion 5

Appendices:

Appendix A - Memorandum A-1

Appendix B - 18 USC § 2252 . . . . . B-1

Appendix C - Judgment, 9th Cir. Court of Appeals . . . C-1

Appendix D - Order D-1

Appendix E - Judgment and Commitment, U.S. District Court E-1

TABLE OF AUTHORITIES

Cases *Page*

Jacobson v. United States, 112 S.Ct. 1535 (1992) 3,4,5

Statutes

18 U.S.C. § 2252(A)(2) 1

28 U.S.C. § 1254 1

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OPINIONS BELOW

The memorandum opinion of the Ninth Circuit panel (App. A) is unpublished, on the determination of the panel that its disposition was not appropriate for publication.

JURISDICTION

The memorandum, opinion of the Court of Appeals panel was entered on June 4, 1992. Timely Petition for Rehearing and Suggestion for Rehearing En Banc was filed. On August 31, 1992 the Petition for Rehearing was denied and the Suggestion for Rehearing En Banc was rejected (App. D). The order of the Ninth Circuit affirming the District Court judgment was entered on September 6, 1992 (App. C). This court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE INVOLVED IN THE CASE

This case involves a prosecution for violation of 18 U.S.C. § 2252(A)(2) (App. 2).

STATEMENT OF THE CASE

Petitioner was charged by indictment dated May 3, 1990 with one count of violating 18 U.S.C. § 2252(A)(2) by knowingly receiving, from a U.S. Customs Service "sting" operation, a videotape containing visual depictions of minors engaged in sexually explicit conduct.

Petitioner filed a motion to dismiss the indictment, based upon the defense of entrapment. At a hearing held on the motion on July 6, 1990, the only evidence offered to show Petitioner's predisposition before being targeted by the government sting operation was the inclusion of his name in the business records of an organization called "Person to Person Directory." The records had been obtained by the Los Angeles Police Department in a raid in 1978 or 1979, more than ten years earlier. No products were sold by that organization, and there was no evidence introduced to show that Petitioner had ever purchased or attempted to purchase any pornographic materials prior to being solicited to do so by the government. The District Court, while denying the motion to dismiss the indictment, made a specific finding that there was no evidence as to why Petitioner's name was in the business records of Person to Person Directory:

> "I'll make that finding on the record so that if there is an appeal from this portion of the trial. I believe the only evidence was that the name was on the list and that the officers who testified had no knowledge why this defendant's name was on that list, which was obtained apparently by the Los Angeles authorities and transmitted to Seattle."

(RT 74)

The case proceeded to trial on August 7, 1990. Following a jury verdict of guilty, a motion for new trial was denied, and judgment and sentence were entered on November 16, 1990 (App. E). Petitioner was sentenced to serve 18 months in prison.

A timely notice of appeal to the United States Court of Appeals for the Ninth Circuit was filed. In an unpublished memorandum opinion filed June 4, 1992, a panel of the Ninth Circuit Court of Appeals affirmed the judgment of the District Court. With regard to the entrapment defense, the panel said:

> "Entrapment focuses on the mind of the criminal, not the conduct of law enforcement officers. *See Hampton v. United States*, 425 U.S. 484, 488 (1976). Therefore, evidence of predisposition need not be known to the government before a sting operation begins."

Having held that the government need not have evidence of predisposition prior to targeting a person for a sting operation, the Ninth Circuit panel found sufficient evidence of Petitioner's predisposition in the fruits of the sting operation itself: Petitioner's responses to a government questionnaire, his purchase of pornographic materials on the government's second offer, and a collection of pornographic materials that were discovered in the search of his home which climaxed the sting operation.

ARGUMENT FOR ALLOWANCE OF WRIT OF CERTIORARI

The unpublished memorandum opinion of the Ninth Circuit panel in this case is in direct conflict with the Supreme Court's decision in *Jacobson v. United States*, 112 S. Ct. 1535 (1992).

This Court reversed the Eighth Circuit judgment affirming Jacobson's conviction because the government ". . . as a matter of law failed to establish that petitioner was independently predisposed to commit the crime for which he was arrested." Jacobson, 112 S. Ct. 1537.

The dissent in *Jacobson* objected that the Court's decision ". . . redefines 'predisposition' and introduces a new requirement that Government sting operations have a reasonable suspicion of illegal activity before contacting a suspect." *Jacobson*, 112 S. Ct. 1544.

This Court replied:

> "The sole issue is whether the Government carried its burden of proving that petitioner was predisposed to violate the law *before* the Government intervened. The dissent is mistaken in claiming that this is an innovation in entrapment law and in suggesting that the Government's conduct prior to the moment of solicitation is irrelevant . . . The Court rejected these arguments five decades ago in *Sorrells*, when the Court wrote that the Government may not punish an individual 'for an alleged offense which is the product of the creative activity of its own officials' and that in such a case the Government 'is in no position to object to evidence of the activities of its representatives in relation to the accused . . .' . . . Indeed, the proposition that the accused must be predisposed prior to contact with law enforcement officers is so firmly established that the Government conceded the point at oral argument, submitting that the evidence it developed during the course of its investigation was probative because it indicated petitioner's state of mind *prior* to the commencement of its investigation."

Jacobson, 112 S. Ct. 1541.

In the present case, the Ninth Circuit panel has followed the dissent in *Jacobson*, and has rejected the majority opinion of this Court. It approved the denial of the Defendant's motion to dismiss, even though it recognized that the Government had no evidence of predisposition other than that produced in the sting operation itself.

CONCLUSION

It is the essence of this Court's opinion in *Jacobson v. United States* that evidence of predisposition to commit a criminal act must be known to the government *before* a person can be targeted by a sting operation. In order to preserve the integrity of the *Jacobson* opinion, this Court must reverse the judgment of the Ninth Circuit panel.

Respectfully submitted,

NELSON CHRISTENSEN
Attorney for Petitioner

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. EUGENE SYKORA Defendant-Appellant.	No. 90-30425 D.C. No. CR-90-132-TSZ MEMORANDUM*

Appeal from the United States District Court
for the Western District of Washington
Thomas S. Zilly, District Judge, Presiding

Argued and Submitted May 4, 1992
Seattle, Washington

Before: PREGERSON, TROTT, and KLEINFELD,
Circuit Judges.

Defendant Eugene Sykora appeals his conviction of knowingly receiving visual depictions of minors engaging in sexually explicit conduct on the grounds of entrapment. 18 U.S.C. §2252(a)(2)(1988). As part of "Operation Circe," a child pornography sting operation, Customs officials obtained Sykora's name from two mailing lists of organizations involved in child pornography. On September 7, 1988, Customs officials sent

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Sykora a questionnaire through a Bangkok front operation. He responded ten days later indicating that he was interested in receiving material related to child pornography. On April 19, 1989, the officials sent him a catalogue and order form, but Sykora did not respond. On September 12, 1989, they sent him a second catalogue. This time he ordered four films described as containing child pornography. After a controlled delivery, the Customs Agents searched Sykora's home and found the four films as well as a number of other items of child pornography.

Sykora claims entrapment as a matter of law under *Jacobson v. United States*, 112 S. Ct. 1535 (1992). But there was more pressure and less predisposition in that case. In *Jacobson*, the Court considered that, until his purchase, the defendant had not been involved in illegal child pornography, *id.* at 1540, and it was only the government's repeated attempts over 26 months that had finally pressured the defendant to succumb, *id.* at 1541. Entrapment focuses on the mind of the criminal, not the conduct of the law enforcement officers. *See Hampton v. United States*, 425 U.S. 484, 488 (1976). Therefore, evidence of predisposition need not be known to the government before a sting operation begins.

The government provides four types of evidence to indicate that Sykora has the necessary predisposition. First, his name appeared on the lists of two child pornography organizations. Second, he indicated on the questionnaire that he was interested in receiving child pornography. Third, he responded to the second solicitation by the government. Fourth, at the time of his arrest, he had an extensive library of child pornography in his home.

The first two types of evidence, his name on old mailing lists and his response to the questionnaire, resemble the evidence found insufficient to establish predisposition in

Jacobson. In Sykora's case, however, there is more. Unlike the defendant in *Jacobson*, the government made only two straightforward mail order solicitations before Sykora purchased the child pornography. The government did not have to work on Sykora for two years to get him to buy. A second mail order solicitation, without more, is not equivalent to the campaign used in *Jacobson*. More importantly, his possession of an extensive collection of child pornography materials, illegal in the state of Washington, *see* Wash. Rev. Code Ann. § 9.68A.070 (1988 § Supp. 1992), indicates sufficient predisposition to purchase child pornography to establish that Sykora was not entrapped as a matter of law.

Sykora also argues that he was entitled to an entrapment jury instruction. He offered [*sic*] an entrapment instruction prior to trial, but he did not object to the court's decision not to give one. His trial strategy was evidently to attack scienter rather than to show entrapment, often a more fruitful approach. The offering of an instruction prior to trial does not preserve an objection in these circumstances. *United States v. Kessi*, 868 F.2d 1097, 1102 (9th Cir. 1989). We do not find the failure to give an entrapment instruction constituted plain error.

The existing illegal collection of child pornography was sufficient to establish predisposition as a matter of law. Because Sykora did not, prior to trial, move to suppress the evidence of his existing library of child pornography, we do not consider whether the search was proper under *United States v. Weber*, 923 F.2d 1338 (9th Cir. 1991). Because the extensive existing collection alone was sufficient to prove predisposition, we do not reach the question of whether the evidence of Sykora's name on the mailing lists constituted heresay [*sic*], was too old under *Sherman v. United States*, 356 U.S. 369 (1958), or was too unreliable under *Jacobson* to demonstrate predisposition.

AFFIRMED.

APPENDIX B

§ 2252. Certain activities relating to material involving the sexual exploitation of minors

(a) Any person who—

(1) knowingly transports or ships in interstate or foreign commerce by any means including by computer or mails, any visual depiction, if—

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct, and

(B) such visual depiction is of such conduct, or

(2) knowingly receives, or distributes, any visual depiction that has been transported or shipped in interstate or foreign commerce by any means including by computer or mailed or knowingly reproduces any visual depiction for distribution in interstate or foreign commerce by any means including by computer or through the mails, if—

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct, and

(B) such visual depiction is of such conduct;

shall be punished as provided in subsection (b) of this section.

(b) Any individual who violates this section shall be fined not more than $100,000, or imprisoned not more than 10 years, or both, but, if such individual has a prior conviction under this section, such individual shall

be fined not more than $200,000, or imprisoned not less than five years nor more than 15 years, or both. Any organization which violates this section shall be fined not more than $250,000.

(Added Feb. 6, 1978, P. L. 95-225, § 2(a), 92 Stat. 7; May 21, 1984, P. L. 98-292, § 4, 98 Stat. 204; Oct. 18, 1986, P. L. 99-500, Title I, § 101(b), 100 Stat. 1783-75; Oct. 30, 1986, P. L. 99-591, Title I, § 101(b), 100 Stat. 3341-75; Nov. 18, 1988, P. L. 100-690, Title VII, Subtitle N, Ch 1, § 7511(b), 102 Stat. 4485.)

APPENDIX C

JUDGMENT

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. EUGENE SYKORA Defendant-Appellant.	No. 90-30425 CT/AG# 90-00132-TSZ

APPEAL FROM the United States District Court for the Western District of Washington (Seattle).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Western District of Washington (Seattle) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED.

Filed and entered: 06/04/92

APPENDIX D

ORDER

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. EUGENE SYKORA Defendant-Appellant.	No. 90-30425 D.C. No. 90-00132-TSZ ORDER

Before: PREGERSON, TROTT and KLEINFELD, Circuit Judges.

The panel has voted to deny the appellant's petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX E

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, Plaintiff, v. EUGENE R. SYKORA SSN; 533-32-5892 11034 N.E. 24th Seattle, WA 98125 Defendant.	No. CR90-132Z JUDGMENT AND COMMITMENT

On the 9th day of November, 1990, came the attorney for the Government and the defendant appeared with counsel, Mark Mestel.

IT IS ADJUDGED that the defendant upon his plea of NOT GUILTY to Count I of the Indictment, and verdict of GUILTY as to that count, has been convicted of the offense of violation of Title 18, United States Code, Section 2252, as charged in the Indictment, and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is GUILTY as charged and convicted.

IT IS ADJUDGED that the defendant be committed to the custody of the Attorney General or his authorized representative for a period of EIGTHTEEN [sic] (18) MONTHS,

to be followed by a THREE (3) YEAR period of supervised release, upon the following terms and conditions as set forth in the Sentencing Guidelines § 5B1.4.

1. Standard Conditions (1-13)

2. Defendant shall not possess firearms or other dangerous weapons without the permission of the Probation Office.

3. Defendant shall submit to a search of person or property conducted in a reasonable manner and at a reasonable time by a Probation Officer.

4. Defendant shall undergo a sexual deviancy evaluation with a therapist approved by the Probation Office and successfully complete a treatment program deemed necessary by the therapist and the Probation Officer.

5. Defendant shall pay a fine of $4,000.00 and a monthly supervision fee of $96.66 as directed by the Probation Office.

6. Defendant shall have no contact with minor children without permission of the Probation Office.

7. Defendant shall self-surrender for the period of incarceration as directed by the Probation Office.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

DATED this 14th day of November, 1990.

s/THOMAS ZILLY
UNITED STATES DISTRICT JUDGE

Presented by:
s/ROBERT G. CHADWELL
Assistant United States Attorney